

Scheduled for Oral Argument on February 26 and 27, 2001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212 & 00-5213 (Consolidated)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MICROSOFT CORPORATION,
Defendant-Appellant.

STATE OF NEW YORK, *ex rel., et al.,*
Plaintiffs-Appellees,
v.
MICROSOFT CORPORATION,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

**MOTION OF CARL LUNDGREN
TO SUGGEST A THIRD PERSPECTIVE
ON THE ALLEGED BIAS AND ALLEGED MISCONDUCT
OF THE DISTRICT COURT JUDGE**

1. **Scope of Motion.** The Appeals Court has announced a schedule for oral argument which indicates how seriously the Court views the allegations that the District Court Judge may have been biased, or otherwise engaged in misconduct. I set forth below an alternative hypothesis concerning the Judge's motivations, and possible direction of bias. This motion has two main sections: "Reasons to Accept this Motion" and "Substance of Third Perspective".

REASONS TO ACCEPT THIS MOTION

2. **Importance and Abnormality of Issue.** Allegations of judicial bias cut to the heart of the Court system, and affect public confidence in the integrity and trustworthiness of judges and courts. Microsoft's allegations of judicial bias have no direct relevance to the actual merits of this case, but only go to the "merits" of the Judge presiding over the case. The presence of these allegations in this case is an unusual and abnormal situation. The District Judge's extra-judicial comments were not part of the trial record below. The Judge's comments present a

factual issue which is being argued here *de novo*. Hence, amici who direct their attention to the various actual merits of the case, would not normally address the issue of judicial bias in the limited space of their briefs; nor did they.

3. **Plaintiffs' Analysis Was Incomplete.** This amicus presumed that the Plaintiffs, in their 150-page brief, would provide an adequate response to the allegations of bias. However, Plaintiffs failed to argue, 1) the Constitutional implications of forbidding a Judge to speak to the press, and 2) the issue of possible bias in favor of Microsoft. It may well be that the Department of Justice failed to see the relevance of the Constitutional issue, and so did not argue it. Likewise, the DOJ may not wish to raise the second point, given that the Judge has granted all their requests so far.

4. **Timing of this Motion.** This motion is provided to the parties two weeks in advance of the scheduled oral argument. This should give the parties and the Court adequate time to respond to or incorporate its points during oral argument. Nor was it possible for this non-attorney amicus to judge the adequacy of Plaintiff's brief on these points, until after Microsoft had filed its reply brief on January 29, 2001 (two weeks ago). Hence, this motion has been filed as expeditiously as possible under the circumstances.

SUBSTANCE OF THIRD PERSPECTIVE

5. Alleged Bias Against Microsoft. Microsoft has alleged that the public comments of Judge Jackson, both to news reporters and otherwise, constitute evidence of bias against Microsoft. These allegations are as interesting as they are unlikely. They also have a man-bites-dog quality. Mr. Jackson is a Reagan-appointed, Republican Judge who (if we believe Microsoft) has inexplicably, and with malice in his heart, attempted to take a great big bite out of a very successful business corporation. Such bias is possible, and very interesting if true, but unlikely.

Instead, Mr. Jackson has repeatedly said that he has nothing but admiration for the technology, products, and general business leadership of Microsoft. Certainly, Microsoft has provided no reason to believe that Mr. Jackson harbored any ill-will or bias against Microsoft before the case began. To be sure, during the course of trial, Mr. Jackson did develop some opinions and conclusions about the individuals running Microsoft, and their attitude towards obeying the antitrust laws. However, such opinions and conclusions are not bias, if they are reasonably based on the evidence which came to his attention.

So much for Mr. Jackson's words; what of his actions? Mr. Jackson has shown considerable imagination in creating a legal environment within which, if Microsoft had availed itself of the opportunity, Microsoft might settle this case out of Court. Even though it is not common practice to do so, Judge Jackson separated his findings of facts from his conclusions of law, so that Microsoft could be granted a few months within which to negotiate a possible settlement. Moreover, even though it was virtually unheard of, he requested a sitting Federal Judge, the reknowned antitrust scholar Richard Posner, to act as a mediator between the two sides. If Judge Jackson had not taken these extraordinary steps, no one would have faulted him for not doing so. That he did take such steps, and showed considerable imagination in doing so, suggests rather strongly that he was not biased against Microsoft.

6. Extra-Judicial Comments. Microsoft alleges that Judge Jackson, in his extra-

judicial comments, has violated the Judicial Conference's "Code of Conduct of United States Judges".¹ I express no opinion as to whether such speech by a Federal Judge constitutes a violation of the Code. However, supposing that such speech is a violation of the Code, it may well be the Code (or its interpretation) which is at fault. Under the First Amendment, Congress (and presumably the Judicial Conference) may not abridge the freedom of speech, or of the press. Basically, Microsoft has accused Judge Jackson of speaking to the press. Unless there is a compelling state interest to prevent this speech to the press, it may not be forbidden, and the Courts may not enforce such an improper Code provision.

Suppose, hypothetically, that Judge Jackson were taken before a disciplinary hearing. Presumably, Mr. Jackson (or his attorneys) would raise the First Amendment as a defense for his conduct. Mr. Jackson could persuasively argue that his speech on the Microsoft case involved matters of great public interest and importance; moreover, he could argue that the public has a great need to understand the workings of judicial process and judicial decision making, insights which only a sitting judge can provide. This does not mean that Judge Jackson would necessarily win his cause. However, unless it can be shown that there already exists a recent, quite definitive, and controlling legal decision that shows otherwise, a First Amendment argument has potential merit. Mr. Jackson is presumably aware of this, and may have taken a calculated risk which could result in a precedent-setting case concerning the free-speech rights of Federal judges. We cannot infer ill-motivation or bias, simply because Judge Jackson spoke to the press, even if doing so (allegedly) is a violation of a judicial Code of ethics.

7. Bias in Favor of Microsoft? If we were to play the odds, we would predict that a Reagan-appointed, Republican judge is far more likely to be biased in favor of Microsoft, than against Microsoft; and far more likely to be in favor of loose or no enforcement of antitrust laws.

¹The relevant provision, Canon 3A(6) states only, "A judge should [not *must*] avoid public comment on the merits of a pending or impending action..." 175 F.R.D. 363 (1998) at 367 or 368 [variously cited at MS Br. 146 and Pls. Br. 148].

Indeed, some of the Judge's comments suggest as much, particularly on the issue of remedy. As Microsoft quoted on page 127 of its initial brief, Judge Jackson allegedly said:

I am not at all comfortable with restructuring the company. I am not sure I am competent to do that. Microsoft is a large and important company, innovative, admirable in a lot of ways. If it ain't broken, don't try to fix it. And it is an engine for the nation's economy. I just don't think that is something I want to try to do on my own.²

To be sure, if Judge Jackson is biased in favor of Microsoft, it has not prevented him from convicting Microsoft on antitrust violations. If this bias has not yet affected the choice of remedy, it is because the Judge gave seemingly undue deference to the Plaintiff's proposed remedy, and refused to hold evidentiary hearings. If this case were to be remanded to District Court for purposes of holding remedy proceedings (whether or not they include third parties), the issue of possible bias in favor of Microsoft would presumably be ripe for review and possible disqualification.

8. What to Do? Microsoft's allegations raise two distinct issues: 1) Did Judge Jackson violate a judicial Code of Conduct by speaking to the press? 2) Do Judge Jackson's comments evidence bias of any kind (if so, to what extent and in which direction)? The answers to these questions are logically distinct. It is possible to answer yes, he violated the Code, but no, he showed no evidence of bias. It is also possible to answer no, he did not violate the Code, but yes, his comments evidence bias, or the appearance of bias. And of course, the answer may be yes to both questions, or no to both questions.

Strictly speaking, this case requires an answer only to the second question. An answer to the first question is necessary only to the extent it may be necessary to establish motive. The second question is a fact question, which presumably must be resolved or reviewed by this Court as part of its decision in this case. If there is no evidence of bias against Microsoft, the case may proceed on its merits: Findings of fact are reviewed for clear error; conclusions of law are

²Joel Brinkley & Steve Lohr, *U.S. v. Microsoft* (2000), pp. 277-278.

reviewed *de novo*. If there is evidence of bias against Microsoft, portions (or all) of the judgement may need to be vacated and remanded to a different judge.

I do not know the proper procedure for analyzing allegations of bias. Perhaps it is this Court, sitting *en banc*, which decides the matter; or perhaps only a committee of this Court or the District Court; or some other procedure. If there is no required procedure, perhaps a Committee of Judges from separate Courts would be best. Regardless of the procedure, these allegations require a careful review of the facts and full context of the Judge's comments. For this purpose, I suggest that all evidence concerning the public comments, possessed by the parties, be sent to whichever Court or Committee is assigned to review this question of bias. The reviewing Committee or Court should then determine whether, to what extent, and in which direction bias may exist.

CONCLUSION

Accordingly, I respectfully request that the Court and the parties discuss this third perspective during oral argument, or in any other appropriate forum or manner.

Respectfully submitted.

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February 12, 2001

CERTIFICATE OF SERVICE

Service of the foregoing *Motion of Carl Lundgren to Suggest a Third Perspective on the Alleged Bias and Alleged Misconduct of the District Court Judge* was made by sending one copy each, in a sealed envelope, postage fully prepaid, addressed to:

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and deposited in the United States Mail by the undersigned this 12th day of February, 2001.

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